

Real Estate Lending Requirements And Loan Documentation

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I. INTRODUCTION

There is a saying: "there are those who own, and there are those who rent." While this saying suggests there is a great difference between mortgagors and lessees, one would be foolish to infer from that that there is a great difference between mortgages and leases. While there are significant differences between these legal constructs, there are, nonetheless, many similarities between them. Both of them are, in essence, based on simple contract law. Neither mortgages nor leases transfer *title* to the subject property. Both of them have evolved significantly from their respective common law roots and both of them are now heavily regulated by statute. As will be discussed more fully herein, when it comes to defaults on leases and mortgages, the remedies available to lessors and mortgagees respectively are quite analogous.

II. LANDLORD'S REMEDIES UPON DEFAULT

If a tenant breaches the terms of the lease, the landlord primarily has two options in seeking remedies. The first option is to commence an ordinary lawsuit to determine legal or equitable rights to, among other things, title to the property, rent, or attorney's fees. As this remedy is common to other areas of the law, it will receive little attention here. The second option, which will be discussed in more depth below, is to commence an unlawful detainer proceeding to recover *possession* of the property from the tenant. This is a remedy unique to landlord-tenant relations. As discussed below, for both logistical and historical reasons, these two options may not be exercised jointly but, instead, must be brought and litigated separately. Consequently, a decision in an unlawful detainer action does not bar actions to determine title to the property or to enforce equitable rights. *William Weisman Holding Co., v. Miller*, 152 Minn. 330, 188 N.W. 732 (1922).

“An unlawful detainer action provides a summary proceeding to quickly determine present possessory rights.” *Eagan East Ltd. Partnership v. Powers Investigations, Inc.*, 554 N.W.2d 621, 622 (Minn. Ct. App. 1996); *see also Lilyerd v. Carlson*, 499 N.W.2d 803 (Minn. 1993). Thus, from a logistical standpoint, the essence of the proceeding would be undermined if its scope were expanded to encompass issues other than present possessory rights. *Eagan East Ltd.*, 554 N.W.2d at 622; *Goldberg v. Fields*, 247 Minn. 213, 76 N.W.2d 668 (1956) (“the remedy which is provided by the unlawful detainer statute is a summary one, and the mode of proceeding is the essence of it”). The summary nature of the unlawful detainer proceeding also “reinforces the public policy . . . ‘to prevent parties from taking the law into their own hands.’” *AMRESO Residential Mortgage Corp. v. Stange*, 631 N.W.2d 444, 446 (Minn. Ct. App. 2001) (quoting *Mutual Trust Life Ins. Co. v. Berg*, 187 Minn. 503, 505, 246 N.W. 9, 10 (1932)).

From a historical perspective, unlawful detainer actions had to be brought separately because they were decided by the municipal courts, courts of limited jurisdiction that had the power to determine issues related to possession, but not issues related to equitable rights of ownership. *See Sternaman v. Hall*, 411 N.W.2d 18, 19 (Minn. Ct. App. 1987); *Albright v. Henry*, 285 Minn. 452, 174 N.W.2d 106, 110 (1970) (“the municipal court shall not try any cause involving the title to real estate except actions of forcible entry and unlawful detainer”); *Leader v. Joyce*, 271 Minn. 9, 135 N.W.2d 34 (1965) (concluding that the transfer of an unlawful detainer action from municipal court to district court made it, in effect, an action in ejectment). With the abolishment of the municipal courts in the 1980’s, unlawful detainer actions were brought in the District Courts, courts of general jurisdiction. Nonetheless, to preserve the benefits of the summary nature of the unlawful detainer proceeding, courts have refused to expand the scope of unlawful detainer hearings in the District Courts, even though the District

Court has the power to determine all disputed issues between the parties. *See AMRESKO*, 631 N.W.2d at 446. Thus, the unlawful detainer action has remained an important part of landlord-tenant law.

A. The Decline of the Self-Help Doctrine and the Rise of the Action for Unlawful Detainer

Over the years, unlawful detainer actions have grown in importance. In large part, this may be the result of greater focus by the legislature on landlord-tenant law. Through numerous statutes, the legislature has greatly influenced legal policy in this area.

At common law, a party entitled to possession of property could recover possession through the use of force. *See Mercil v. Broulette*, 66 Minn. 416, 69 N.W. 218 (1896). Because the use of force in recovering possession of property led to breaches of the peace, statutes were enacted to prevent "self-help" accompanied by force,¹ and to provide for criminal liability for intentional ouster or exclusion of a tenant,² treble damages and attorney's fees for unlawful ouster of a residential tenant,³ treble damages

¹ Minnesota Statutes, §504B.281, which was derived from Minnesota's territorial statutes, provides that "no person may occupy or take possession of real property except where occupancy or possession is allowed by law, and in such cases, the person may not enter by force, but only in a peaceable manner."

² Minnesota Statutes, §504B.225 provides that "a landlord, an agent, or person acting under the landlord's direction or control who unlawfully and intentionally removes or excludes a tenant from lands or tenements or intentionally interrupts or causes the interruption of electrical, heat, gas, or water services to the tenant with intent to unlawfully remove or exclude the tenant from lands or tenements is guilty of a misdemeanor."

³ Minnesota Statutes, §504B.231(a) provides that "if a landlord, an agent, or other person acting under the landlord's direction or control unlawfully and in bad faith removes, excludes, or forcibly keeps out a tenant from residential premises, the tenant may recover from the landlord treble damages or \$500, whichever is greater, and reasonable attorney's fees."

for forcible entry,⁴ and treble damages for forcible eviction.⁵ As a result of this legislation, the courts faced the task of determining what constituted a “forcible” entry. See *Baldwin v. Fisher*, 110 Minn. 186, 124 N.W. 1094 (1910) (discussing whether a party’s destruction of owner’s crops violates the restriction on forcible entry onto property); *Poppen v. Wadleigh*, 235 Minn. 400, 51 N.W.2d 75 (1952) (concluding that the landlord’s posting of “No Trespassing” signs so as to exclude a tenant does not constitute exclusion in a “forcible manner” for purposes of Minnesota Statutes, §557.08).

In 1978, the Minnesota Supreme Court departed from the common law in the case of *Berg v. Wiley*, 264 N.W.2d 145 (Minn. 1978). Pursuant to a five-year commercial lease, Berg operated a restaurant on Wiley’s property. The lease contained provisions requiring Berg to operate the restaurant in a lawful manner and to receive Wiley’s written consent to make structural modifications to the property. Approximately halfway through the term of the lease, Wiley accused Berg of breaching the lease by making changes to the property without written authorization and by operating an unclean kitchen in violation of health regulations.

Wiley gave Berg a deadline for complying with the lease. Berg failed to comply with Wiley’s demands before the deadline. On the date of the deadline, Wiley attempted to change the locks on the building while Berg was absent, only to be stopped upon

⁴ Minnesota Statutes, §557.09 provides that “in case of forcible entry and detention, if a person, claiming in good faith, under color of title, to be rightfully in possession, so put out or kept out, shall recover damages therefor, judgment may be entered in that person’s favor for three times the amount at which the actual damages are assessed.”

⁵ Minnesota Statutes, §557.08 provides that “if a person who is put out of real property in a forcible manner without lawful authority, or who, being so put out, is afterwards kept out by force, shall recover damages therefor, judgment may be entered for three times the amount at which the actual damages are assessed.”

Berg's return. At the end of the day, Berg closed the store for "remodeling." Wiley returned when Berg was absent and successfully changed the locks.

The Court concluded that Wiley's entry was not peaceable. It observed that, given the animosity between Berg and Wiley, it was only Berg's self-restraint that prevented any breach of the peace throughout the course of the various judicial proceedings between the parties. Furthermore, the Court was reluctant to endorse Wiley's covert actions, an endorsement that would likely increase instances of violence by encouraging tenants to be increasingly vigilant. The Minnesota Supreme Court then joined a growing trend among the states, prospectively holding that "the only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord's claim of breach of a written lease is by resort to the judicial process." *Berg*, 264 N.W.2d at 151. The Court concluded that Minnesota law, now codified at Minn. Stat. §§504B.281-371 "provide[s] the landlord with an adequate remedy for regaining possession in every such case." *Id.* Thus, with respect to real property, the common law rule of self-help was abolished in favor of the statutory unlawful detainer action, now called an eviction action.

B. Eviction Actions

Minnesota law permits an eviction action to be brought against a party who unlawfully detains real property.⁶ Minnesota Statutes §504B.285 permits landlords to bring eviction actions against, among others, tenants who violate material provisions of their lease, and tenants who fail to pay rent, which, in itself, is typically a material

⁶ Minnesota Statutes, §504B.301 provides that "a person may be evicted if the person has unlawfully or forcibly occupied or taken possession of real property or unlawfully detains or retains possession of real property."

provision of a lease.⁷ However, the statute was not meant replace the common law action for ejectment, a type of action in which title is determined. *See Berg v. Wiley*, 226 N.W.2d 904, 906 (Minn. 1975); *O'Neill v. Erickson*, 72 Minn. 446, 75 N.W. 701 (1898); *Warnert v. MGM Properties*, 362 N.W.2d 364, 366 n.1 (Minn. Ct. App. 1985). As discussed above, the purpose of the statute is to permit for a summary proceeding in which to determine the right to possession of property.

Given the summary nature of the eviction action, a landlord who seeks to avail himself of this remedy must not delay. Minnesota law provides a three-year statute of limitations on eviction actions.⁸ To bring a summary eviction action against an occupant

⁷ Minnesota Statutes, §504B.285 describes eviction actions. It provides in relevant part: "Subdivision 1. **Grounds.** The person entitled to the premises may recover possession by eviction when:

"(1) any person holds over real property....;"

"(2) any person holds over real property after termination of the time for which it is demised or leased to that person or to the persons under whom that person holds possession, contrary to the conditions or covenants of the lease or agreement under which that person holds, or after any rent becomes due according to the terms of such lease or agreement; or

"(3) any tenant at will holds over after the termination of the tenancy by notice to quit.

...
 "Subd. 4. **Nonlimitation of landlord's rights.** Nothing contained in subdivisions 2 and 3 limits the right of the landlord pursuant to the provisions of subdivision 1 to terminate a tenancy for a violation by the tenant of a lawful, material provision of a lease or contract, whether written or oral, or to hold the tenant liable for damage to the premises caused by the tenant or a person acting under the tenant's direction or control.

"Subd. 5. **Combining allegations.** (a) An action for recovery of the premises may combine the allegation of nonpayment of rent and the allegation of material violation of the lease, which shall be heard as alternative grounds. . . ."

⁸ Minnesota Statutes, §504B.311 provides that "no person may bring an eviction action against an occupant of any premises where that occupant's lease, or the lease of that occupant's ancestors or predecessor in interest, was terminated more than three years before the beginning of the action and where the occupant of the premises or that person's ancestors or predecessor in interest were in quiet possession for three consecutive years immediately before the eviction."

in quiet possession of the property pursuant to §504B.285, the landlord must seek to evict the occupant within three years of the termination of the occupant's interest. After three years have passed, the landlord must bring a common law ejectment action to determine his rights. See *Berg*, 264 N.W.2d at 151, n.8; *Priordale Mall Investors v. Farrington*, 390 N.W.2d 412 (Minn. Ct. App. 1986). This statute of limitations, however, does not bar an action against a tenant who violates the covenants or conditions of his tenancy, even if the tenant has remained in possession for more than three years after the expiration of the lease. *Priordale Mall Investors*, 390 N.W.2d at 415, n.2. Thus, it appears that if the tenant violates a covenant, for example a covenant to pay rent or not to engage in unlawful activities, the landlord could still bring an eviction action.

C. Statutory Covenants

As seen above, neither Minn. Stat. §504B.285 nor Minn. Stat. §504B.311 limit a landlord's right to seek eviction of a tenant for breaching a covenant of the lease. Furthermore, Minnesota law gives landlords great freedom to enter into covenants with a tenant regarding the terms of the lease.⁹ Apart from preventing covenants that abrogate

⁹ Minnesota Statutes, §504B.161 provides that:

"Subd. 2. Tenant maintenance. The landlord or licensor may agree with the tenant or licensee that the tenant or licensee is to perform specified repairs or maintenance, but only if the agreement is supported by adequate consideration and set forth in a conspicuous writing. No such agreement, however, may waive the provisions of subdivision 1 or relieve the landlord or licensor of the duty to maintain common areas of the premises....

"Subd. 4. Covenants are in addition. The covenants contained in this section are in addition to any covenants or conditions imposed by law or ordinance or by the terms of the lease or license."

statutory covenants,¹⁰ the law places few restrictions on the types of terms a landlord may include in a lease.

At the same time, the law dictates certain covenants a tenant must make with a landlord. For example, the law states that every residential lease in Minnesota contains an implied covenant by the landlord and tenant that neither party will permit unlawful activities on the premises.¹¹ While this covenant is ostensibly meant to protect each party

¹⁰ For example, Minn. Stat. §504B.161, subd. 1 contains several covenants by the landlord of habitability of residential property; these may not be waived in the lease. Likewise, Minn. Stat. §504B.211, Subd. 2, which protects a tenant's right to privacy provides that a "residential tenant may not waive and the landlord may not require the residential tenant to waive the residential tenant's right to prior notice of entry under this section as a condition of entering into or maintaining the lease." A final example appears in Minn. Stat. §504B.311 places certain restrictions on a landlord's ability to evict a tenant based upon familial status; however, even this section of the statute provides exceptions for "nonpayment of rent, damage to the premises, disturbance of other tenants, or other breach[es] of the lease."

¹¹ Minnesota Statutes, §504B.171, subdivision 1, provides that "in every lease or license of residential premises, whether in writing or parol, the landlord or licensor and the tenant or licensee covenant that:

"(1) neither will:

"(i) unlawfully allow controlled substances in those premises or in the common area and curtilage of the premises;

"(ii) allow prostitution or prostitution-related activity as defined in section 617.80, subdivision 4, to occur on the premises or in the common area and curtilage of the premises;

"(iii) allow the unlawful use or possession of a firearm in violation of section 609.66, subdivision 1a, 609.67, or 624.713, on the premises or in the common area and curtilage of the premises; or

"(iv) allow stolen property or property obtained by robbery in those premises or in the common area and curtilage of the premises; and

"(2) the common area and curtilage of the premises will not be used by either the landlord or licensor or the tenant or licensee or others acting under the control of either to manufacture, sell, give away, barter, deliver, exchange, distribute, purchase, or possess a controlled substance in violation of any criminal provision of chapter 152. The covenant is not violated when a person other than the landlord or licensor or the tenant or licensee possesses or allows controlled substances in the premises, common area, or curtilage,

from unlawful activities allowed by the other party, the power to terminate a lease for unlawful activity gives a landlord great power in evicting a tenant. See *Minneapolis Public Housing Authority v. Greene*, 463 N.W.2d 558 (Minn. Ct. App. 1990). *Greene* involved the eviction of a tenant after cocaine was found in the premises and her son, who was listed on the lease as a family member, was charged with possession of a controlled substance. Under similar circumstances, the Court of Appeals upheld an eviction of a tenant based upon the possession of illegal drugs by a co-tenant, the tenant's son. See *Phillips Neighborhood Housing Trust v. Brown*, 564 N.W.2d 573 (Minn. Ct. App. 1997).

D. Statutory Right of Redemption

Although an eviction proceeding is a powerful and efficient tool for enforcing a lease agreement, a tenant who has breached the lease agreement is not powerless against it. Minnesota law permits a tenant against whom an eviction action is commenced for

unless the landlord or licensor or the tenant or licensee knew or had reason to know of that activity."

Subdivision 2 of §504B.171 provides that "a breach of the covenant created by subdivision 1 voids the tenant's or licensee's right to possession of the residential premises. All other provisions of the lease or license, including but not limited to the obligation to pay rent, remain in effect until the lease is terminated by the terms of the lease or operation of law. If the tenant or licensee breaches the covenant created by subdivision 1, the landlord may bring, or assign to the county attorney of the county in which the residential premises are located, the right to bring an eviction action against the tenant or licensee. The assignment must be in writing on a form provided by the county attorney, and the county attorney may determine whether to accept the assignment. If the county attorney accepts the assignment of the landlord's right to bring an eviction action:

"(1) any court filing fee that would otherwise be required in an eviction action is waived; and

"(2) the landlord retains all the rights and duties, including removal of the tenant's or licensee's personal property, following issuance of the writ of recovery of premises and order to vacate and delivery of the writ to the sheriff for execution."

Subdivision 3 of §504B.171 provides that "the parties to a lease or license of residential premises may not waive or modify the covenant imposed by this section."

nonpayment of rent to “redeem the tenancy and be restored to possession” by paying the landlord.¹² The right of redemption may be exercised at any time before the tenant delivers possession to the landlord. Forfeiture of the tenant’s right of redemption is not favored in law or equity. See *Jandric v. Skahen*, 235 Minn. 256, 50 N.W.2d 625 (1951). The tenant’s right of redemption is not limited to instances in which the landlord has reserved a right to reenter the property. *University Community Properties v. New Riverside Café*, 268 N.W.2d 573, 575 (Minn. 1978). However, it is not a defense available to a tenant-at-will. *Id.*

However, the right of redemption only applies to actions for nonpayment of rent. The defense is unavailable for a material breach of the lease. “A landlord’s right of action for unlawful detainer is complete upon a tenant’s violation of a lease condition.” *Minneapolis Comm. Dev. Agency v. Smallwood*, 379 N.W.2d 554, 556 (Minn. Ct. App. 1985) (citing *First Minneapolis Trust Co. v. Lancaster Corp.*, 185 Minn. 121, 131, 240 N.W. 459, 464 (1931)). Thus, unlike the case of redemption for nonpayment of rent, “subsequent remedial action by a tenant cannot nullify a prior lease violation.” *Minneapolis Comm. Dev. Agency*, 379 N.W.2d at 556.

In general, the tenant can exercise the right of redemption so long as he remains in possession of the property. *Birk v. Lane*, 354 N.W.2d 594 (Minn. Ct. App. 1984). The right of redemption applies until the court issues an order dispossessing the tenant and

¹² Minnesota Statutes, §504B.291, subdivision 1(a) provides that “a landlord may bring an eviction action for nonpayment of rent irrespective of whether the lease contains a right of reentry clause. Such an eviction action is equivalent to a demand for the rent. In such an action, unless the landlord has also sought to evict the tenant by alleging a material violation of the lease under section 504B.285, subdivision 5, the tenant may, at any time before possession has been delivered, redeem the tenancy and be restored to possession by paying to the landlord or bringing to court the amount of the rent that is in arrears, with interest, costs of the action, and an attorney’s fee not to exceed \$5, and by performing any other covenants of the lease.”

permitting reentry by the landlord. *614 Company v. D.H. Overmyer Co., Inc.*, 211 N.W.2d 891 (Minn. 1973). Thus, the timing of an eviction action can be critical to a tenant's exercise of the right of redemption.

E. Common Covenants in Leases

Having discussed a landlord's remedies upon default, one may now turn to a consideration of the lease provisions whose breach would give rise to such remedies. While it might seem unusual to discuss the remedy before the injury, it is entirely appropriate, given the specificity of the remedy and the great variety of lease provisions that could give rise to an injury. While there are few possible remedies under the statute, there are many possible injuries.

In drafting lease provisions, there is one fundamental factor to consider: whether the subject property is residential or commercial. Many lease provisions will be unaffected by the type of lease agreement between the parties. For example, the payment of rent, prior written permission to modify, repair, or improve the premises, and to keep the premises, utilities, and appliances in reasonable repair, are common provisions in both commercial and residential leases. However, the statutes distinguish between these types of leases to some extent. Furthermore, because these types of leases serve very different functions, it would be foolish for a landlord not to take this into an account when considering the terms of a lease. For purposes of these materials, only covenants in commercial leases will be addressed.

Given the wide variety of uses to which commercial property may be put, the landlord has great freedom in drafting default provisions in commercial leases. One common restriction is upon the "use" of the property; a "use" provision in a commercial lease allows the landlord to control the kind of business purposes to which the property may be put. These provisions can be general (e.g. "commercial use," "manufacturing,"

“retail sales,” or “food service”), or very specific (e.g. “for metal fabrication,” or “the operation of a Mexican grocery store”).

Not only could the lease limit *what* use may be made of the premises, it may even regulate *how* the premises are used. For example, the lease could require that the tenant occupy the premises. The lease could also require certain hours of operation, a term particularly useful in multi-unit properties, such as a shopping mall. The lease could also require the tenant to conduct its business continuously throughout the term of the lease. It could also limit the tenant’s use of signage or the use of common areas on the premises for advertising purposes. It could limit the use of hazardous materials and require reporting of possible contamination. Finally, it could require that the business be conducted so as not to create a public nuisance.

Other general provisions could include compliance with all relevant state and federal laws and regulations. A landlord may require that the tenant be financially solvent. The landlord also may require the tenant to maintain a certain level of liability or other insurance coverage.

By no means is this an exhaustive description of possible covenants that could be made in a lease. Indeed, given the freedom of the landlord and tenant to contract, creating an exhaustive list of possible lease covenants would be difficult, if not impossible. Nonetheless, these are some of the most common.

III. MORTGAGES AND FORECLOSURES

Mortgages have occupied a place in the law for centuries. While initially a construct of the common law in England, the conceptual framework of a mortgage has evolved dramatically over the years. However, in its most basic sense, a mortgage is simply a contract for the payment of a debt owed by one party, the mortgagor, to another,

the mortgagee. What makes a mortgage particularly advantageous in comparison to a simple contract for the payment of a debt is that a mortgage identifies specific property that may be used to satisfy the debt. While the giving of a mortgage was once treated as the conveyance of a legal interest in real property, under Minnesota law, it creates only a lien on the property or the security for the debt. See *Hatlestad v. Mutual Trust Life Ins. Co.*, 197 Minn. 640, 268 N.W. 665 (1936); see also *Lindquist v. Agre*, 155 Minn. 20, 191 N.W. 1010 (1923); *Hill v. Edwards*, 11 Minn. 22 (Gil. 5) (1865); *City of St. Paul v. St. Anthony Flats Ltd. Partnership*, 517 N.W.2d 58 (Minn. Ct. App. 1994).

As with any contract, the remedies available to a party upon the breach of the contract are often as important as the terms of the contract itself. This is no less true in the case of a default on a mortgage. Like a default on a lease, a mortgage default could be litigated as a simple breach of contract, resulting in a judgment against the mortgagor and in favor of the mortgagee. See *Slingerland v. Sherer*, 46 Minn. 422, 49 N.W. 237 (1891). However, the commencement of a breach of contract claim for a default on a mortgage ignores the primary benefit of having a mortgage: specific property is available to satisfy the debt. Thus, the more popular remedy available to the mortgagee upon the default by the mortgagor is foreclosure on the property. The mortgagee can pursue either remedy (i.e. for personal judgment or for foreclosure) or both, so long as there is no double recovery. *City of St. Paul*, 517 N.W.2d at 61.

As discussed more specifically below, the foreclosure upon real property, unlike the commencement of a lawsuit for breach of contract, is heavily regulated by statute; in this way, it is similar to eviction proceedings in the landlord-tenant context. Minnesota statutes provide for three methods of foreclosure: foreclosure by advertisement¹³

¹³ See generally Minn. Stat. §§ 580.01 to 580.30 and 582.01 to 582.32.

foreclosure by action,¹⁴ and voluntary foreclosure.¹⁵ While these three types of foreclosures share certain fundamental characteristics, they each have unique qualities and benefits. Without discussing each type of these methods in detail, an examination of one provides valuable insights into the others.

A. Foreclosure by Advertisement

The first, and perhaps most convenient, type of foreclosure is a foreclosure by advertisement. A foreclosure by advertisement is a proceeding *in pais*, *ex parte*, and *in rem*, meaning, respectively, that it takes place without a legal proceeding, is done by or on behalf of one party, and is brought against the mortgaged property itself. See *Young v. Penn Mut. Life Ins. Co.*, 196 Minn. 403, 265 N.W. 278 (1936). Each of these characteristics helps the mortgagee foreclose on the mortgaged property more easily and efficiently. In essence, this is accomplished by ignoring the mortgagor (bringing an *ex parte* and *in rem* proceeding); however, as will be seen below, mortgagors still retain a very powerful right in the foreclosure process, the right of redemption.

While foreclosure by advertisement may be a popular method of foreclosure, only certain mortgages may be foreclosed in this manner. Minnesota law provides that “any mortgage of real estate *containing a power of sale*, upon default being made in any condition thereof, may be foreclosed by advertisement.” Minn. Stat. § 580.01 (emphasis added). Powers of sale are not the creatures of statute, but of the convention of the parties. See *Webb v. Lewis*, 45 Minn. 285, 47 N.W. 803 (1891). Thus, while powers of

¹⁴ See generally Minn. Stat. §§ 581.01 to 581.12 and 582.01 to 582.32.

¹⁵ See Minn. Stat. § 582.32.

sale are relatively common in mortgages, there is no specific language that *must* be used to create such a power.¹⁶

However, mortgages not containing a power of sale may not be foreclosed by advertisement, but must be foreclosed by action. See *King v. Meighen*, 20 Minn. 264 (Gil. 237) (1874). Where the mortgage contains no power of sale, an attempted foreclosure by advertisement is void. See *Purcell v. Thornton*, 128 Minn. 255, 150 N.W. 899 (1915). That is because a foreclosure by advertisement is a purely statutory creation; to avail oneself of this method of foreclosure, compliance with the statutory requirements is necessary. See *Hudson v. Upper Michigan Land Co.*, 165 Minn. 172, 206 N.W. 44 (1925); *Moore v. Carlson*, 112 Minn. 433, 128 N.W. 578 (1910). However, an action to set aside a foreclosure sale as a result of certain defects in the foreclosure process shall be commenced within five years of the date of the sale.¹⁷ Otherwise, an action to set aside the sale shall be commenced within 15 years.¹⁸

Because foreclosure by advertisement is a statutory creation, familiarity with the provisions of the foreclosure statute is essential in understanding the foreclosure process.

B. Statute of Limitations

In any judicial proceeding, the relevant statute of limitations must be observed by the party bringing the action. Although foreclosure by advertisement is a proceeding *in pais* and, thus, not technically a legal proceeding, there is a statute of limitations for bringing such an action. However, unlike the six-year statute of limitation provided for

¹⁶ For example, a mortgage could create a power of sale by stating "in case of default of any of the foregoing covenants, the Mortgagor hereby authorizes and empowers the mortgagee to sell the property at public auction and convey the same to the purchaser in fee simple."

¹⁷ See Minn. Stat. § 580.20.

¹⁸ See Minn. Stat. § 580.21.

an ordinary breach of contract claim,¹⁹ actions to foreclose a mortgage must be brought within 15 years,²⁰ a period conspicuously similar to the limitations period provided for claims for recovery of *possession* of real estate.²¹ See *Lundberg v. Northwestern National Bank of Minneapolis*, 216 N.W.2d 121 (Minn. 1974) (a mortgage and the underlying debt are separate and independent contracts; mortgage may be foreclosed even though recovery on the underlying debt is barred by the statute of limitations). The time within which a foreclosure proceeding may be commenced shall begin to run from the date of such mortgage, unless the time of the maturity of the debt secured by the mortgage shall be clearly stated in the mortgage.²²

C. Right of Foreclosure

In order to be entitled to bring a foreclosure proceeding, three conditions must be satisfied. First, there must be a default in a condition of the mortgage that triggers the mortgagee's power to sell.²³ Without an event of default, the power to sell does not become operative. See *Jones v. Ewing*, 22 Minn. 157 (1875); *Mueller v. Ober*, 172 Minn. 349, 215 N.W. 781 (1927). Just as with an ordinary contract, the occurrence of a default is governed by the terms of the mortgage. Consequently, it is impossible to provide an exhaustive list of mortgage terms that could give rise to a default; as was the case with leases above, an examination of possible breaches will follow an examination of possible remedies. Needless to say, a violation of a material covenant could trigger the power to sell.

¹⁹ See Minn. Stat. § 541.05, subd. 1(1).

²⁰ Minn. Stat. § 541.03, subd. 1 provides that "[n]o action or proceeding to foreclose a real estate mortgage, whether by action or advertisement or otherwise, shall be maintained unless commenced within 15 years from the maturity of the whole of the debt secured by the mortgage."

²¹ See Minn. Stat. § 541.02.

²² See Minn. Stat. § 541.03, subd. 2.

²³ See Minn. Stat. § 580.02.

However, though there has been a default on the mortgage, Minnesota law permits a junior mortgagee to cure certain defaults in a prior mortgage by making payments to the prior mortgagee.²⁴ Defaults that may be cured in this manner include the failure to pay any taxes or assessments on the property, the failure to pay any insurance premiums, and the failure to pay principal or interest on the debt.²⁵ Any amounts paid by the junior mortgagee become part of the debt secured by the junior mortgage and shall accrue interest at the rate permitted by the prior lien; to prove such payments, the junior mortgagee must record an affidavit describing the premises involved and payments made.²⁶

The second condition on bringing a foreclosure proceeding is that no actions to recover the underlying debt have been instituted; however, if such an action has been instituted, it must have either been discontinued or the execution on the judgment must have been returned unsatisfied.²⁷ The pendency of an action to recover debt secured by a mortgage suspends the mortgagee's right to foreclose. *Adlinger v. Close*, 161 Minn. 404, 201 N.W. 625 (1925).

Finally, the party commencing the foreclosure action must have record title to the property. Thus, the party's mortgage must have been recorded or, if the mortgage had been assigned to the party, all assignments of the mortgage must have been recorded.²⁸

D. Reinstatement

Once the right to foreclose on the mortgage accrues, foreclosure proceedings may be commenced. However, just because a proceeding has been commenced does not mean

²⁴ See Minn. Stat. § 580.29.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Minn. Stat. § 580.02.

²⁸ See Minn. Stat. § 580.02.

that it will proceed to a conclusion. The foreclosure statute provides for the cessation of foreclosure proceedings and the reinstatement of a mortgage if an interested party, the mortgagor, owner, or holder of a subsequent encumbrance or lien, pays the amount "actually due thereon and constituting the default actually existing in the conditions of the mortgage," including any costs of foreclosure owed.²⁹ For purposes of reinstatement, the amount "actually due" is calculated without reference to any acceleration clauses in the mortgage. *Davis v. Davis*, 293 Minn. 44, 196 N.W.2d 473 (1972).

E. Foreclosure and Sale of Property

Once the foreclosure process is started, very specific statutory instructions must be followed in completing the sale of the property. Failure to substantially comply with the statutory provisions could result in the sale being set aside.³⁰

First of all, if an attorney is employed to conduct the foreclosure, the attorney's authority must be properly recorded in the public record.³¹ Secondly, the mortgagee must give six weeks' published notice of the sale.³² Any postponement of the sale must be advertised "as soon as practicable, in the newspaper in which the original advertisement was published."³³ The occupant of the property must be served with notice at least four weeks before the sale; service upon the occupant shall be accomplished in the same

²⁹ See Minn. Stat. § 580.30.

³⁰ See Minn. Stat. §§ 580.20 and 580.21.

³¹ Minn. Stat. §580.05 states that "when an attorney at law is employed to conduct such foreclosure, the authority of the attorney at law shall appear by power of attorney executed and acknowledged by the mortgagee or assignee of the mortgage in the same manner as a conveyance, and recorded prior to the sale in the county where the foreclosure proceedings are had. If such attorney be employed on behalf of such mortgagee or assignee by an attorney in fact, the attorney's authority shall likewise be evidenced by recorded power."

³² See Minn. Stat. § 580.03.

³³ See Minn. Stat. § 580.07.

manner as the service summons in a civil action is.³⁴ Thirdly, notices must be mailed to parties with a legal interest in the property who have properly filed a request for notice.³⁵ Finally, the law contains specific instructions regarding the information that must be contained in the notices.³⁶

The sale of the property shall be conducted by the sheriff or sheriff's deputy and take place in the county in which the property is located.³⁷ If the mortgaged property consists of distinct parcels, they shall be sold separately and the sheriff shall not sell more property than is necessary to satisfy the amount due on the mortgage, plus costs of the sale, accrued interest, and taxes paid.³⁸ The property is sold to the highest bidder.³⁹

By law, the mortgagee "may fairly and in good faith" purchase the property sold at auction.⁴⁰ If the proceeds from the sale exceed the amount owed upon the mortgage, the surplus shall be paid to the mortgagor.⁴¹ If the proceeds of the foreclosure sale are insufficient to pay off the outstanding debt on the property, the mortgagee may obtain a deficiency judgment against the mortgagor.⁴²

After the sale has been completed, the sheriff or sheriff's deputy shall deliver to the purchaser a certificate of sale containing: 1) a description of the mortgage; 2) a description of the property sold; 3) the price for each parcel sold; 4) the time and place of the sale and the name of the purchaser; and 5) the time allowed by law for redemption of the property.⁴³ The officer is then required to record the certificate within certain

³⁴ See Minn. Stat. § 580.03.

³⁵ See Minn. Stat. § 580.032.

³⁶ See Minn. Stat. § 580.04.

³⁷ See Minn. Stat. § 580.06.

³⁸ See Minn. Stat. § 580.08.

³⁹ See Minn. Stat. § 580.06.

⁴⁰ See Minn. Stat. § 580.11.

⁴¹ See Minn. Stat. §§ 580.09 and 580.10.

⁴² See Minn. Stat. §§ 580.225, 581.09, and 582.30, subd. 1.

⁴³ See Minn. Stat. § 580.12.

prescribed limits, depending upon the length of the redemption period.⁴⁴ If the property sold was located in more than one county, a certified copy of the certificate of sale may be recorded in the county in which the sale did not take place.⁴⁵ Every certificate of sale shall be prima facie evidence that all of the requirements of the law have been complied with; after the time for redemption has expired, it provides prima facie evidence of title in fee in the purchaser at the sale.⁴⁶

The law also provides for the recording of certain other documents. A party may procure and record various affidavits regarding the sale, including an affidavit relating to the publishing of the notice of sale and of any notice of postponement, an affidavit of service on the occupant of the premises, an affidavit by the foreclosing party regarding the military status of the owner of the property, an affidavit concerning the service of a notice of sale upon the Secretary of the United States Treasury Department or the Commissioner of Revenue for the State of Minnesota, and an affidavit by the foreclosing party that sets forth the names of persons to whom the notice of sale was mailed.⁴⁷ Though not required by the foreclosure statute, the failure to notify governmental bodies of the sale could create title problems if tax liens exist on the property. *See Hesselgrave v. Harrison*, 435 N.W.2d 861, 864 (Minn. Ct. App. 1989). Such affidavits constitute prima facie evidence of the facts stated therein.⁴⁸ Within 10 days after the filing for record of the certificate of sale, the foreclosing party shall file an itemization of the costs

⁴⁴ See Minn. Stat. §§ 580.12 and 580.14.

⁴⁵ See Minn. Stat. § 580.13.

⁴⁶ See Minn. Stat. § 580.19.

⁴⁷ See Minn. Stat. § 580.15.

⁴⁸ See Minn. Stat. § 580.15.

and disbursements, including attorney's fees, that have been "absolutely and unconditionally paid or incurred."⁴⁹

F. The Right of Redemption

Upon the commencement of a foreclosure proceeding, the mortgagor has a right to "redeem" the property. The right of redemption is the right to purchase the foreclosed property within a specific period of time. At the time of the commencement of foreclosure proceedings the mortgagor enjoys an equity of redemption. The mortgagor's equity of redemption expires after the foreclosure sale, with purchaser taking title that mortgagor had, subject to mortgagor's statutory right of redemption. *State v. Zacher*, 490 N.W.2d 149, 151 (Minn. Ct. App. 1992). The purchaser of property at a foreclosure sale takes the title subject to the right of redemption in previous owners of property. *Bradley v. Bradley*, 554 N.W.2d 761, 764 (Minn. Ct. App. 1996). Given the historical and statutory prominence of the right of redemption, it cannot be abrogated by the parties in the mortgage agreement. *See Hill v. Edwards*, 11 Minn. 22 (Gil. 5) (1865).

The mortgagor is given 6 months in which to redeem the property by paying the sale price of the property, with interest from the time of the sale, taxes, and other costs.⁵⁰ A 12-month redemption period is provided to the mortgagor when the property is in agricultural use.⁵¹ Upon a proper showing that the property has been abandoned, a showing that must be made before the foreclosure sale, the redemption period may be reduced to five weeks by court order.⁵² During the redemption period, the mortgagor

⁴⁹ See Minn. Stat. § 580.17. It should be noted that, with limited exceptions, Minnesota Statutes, § 580.18 permits the mortgagor to recover treble damages for any sums charged as costs and disbursements but not absolutely paid.

⁵⁰ Minn. Stat. § 580.23, subd. 1.

⁵¹ Minn. Stat. § 580.23, subd. 2.

⁵² Minn. Stat. § 582.032.

retains the right of ownership, including the right of possession and the right to rents and profits. *State v. Zacher*, 504 N.W.2d 468, 471 (Minn. 1993).

If the mortgagor does not redeem the property within the applicable period of time, creditors are given the opportunity to redeem the property. Redemption by a junior mortgagee or lienholder is the right to repurchase from the buyer property that was sold in satisfaction of a judgment or other claim against the debtor. *City of St. Paul*, 517 N.W.2d at 60. In order to reserve their rights to redeem, creditors must file a Notice of Redemption during the mortgagor's redemption period.⁵³ After the expiration of the mortgagor's redemption period, the senior creditor is given 7 days to redeem the property, followed by each of the junior creditors, respectively. A creditor who fails to redeem properly his interest in the property forfeits his interest. *Sieve v. Rosar*, 613 N.W.2d 789, 792 (Minn. Ct. App. 2000). However, upon payment of the proper amount, the person from whom the property is redeemed issues a certificate of redemption.⁵⁴ A certificate of redemption provides prima facie evidence that all facts recited therein relating to the act of redemption are true. *City of St. Paul*, 517 N.W.2d at 61.

G. Alternative Foreclosure Methods

As mentioned above, Minnesota statutes provides for two alternative methods of foreclosure besides foreclosure by advertisement, specifically foreclosure by action and voluntary foreclosure. While it is unnecessary to examine these methods of foreclosure in depth, there are certain noteworthy similarities between these various methods.

A foreclosure by action is simply a judicial action that seeks approval of the sale of foreclosed property. Such an action is governed by the rules governing other civil actions.⁵⁵ But, apart from certain procedural aspects of a foreclosure action, the rights of

⁵³ Minn. Stat. §580.24.

⁵⁴ Minn. Stat. §580.26.

⁵⁵ Minn. Stat. §581.01.

the parties are essentially the same. In fact, many of the statutory provisions for foreclosure by advertisement are incorporated by reference in the foreclosure action statute.⁵⁶ Other sections are closely analogous.⁵⁷

The other statutory method of foreclosure is voluntary foreclosure. A voluntary foreclosure occurs by agreement of the mortgagor and mortgagee. Because the statute requires that there be a default on the mortgage for one month at the time of the agreement, a voluntary foreclosure functions as a settlement of the dispute between the parties.⁵⁸ The voluntary nature of this proceeding significantly affects the rights of the parties.

Under voluntary foreclosure, there is no right of reinstatement.⁵⁹ The mortgagor's right of redemption is reduced to two months.⁶⁰ The mortgagee waives its right to a deficiency judgment, while the mortgagor waives its right to any surplus proceeds, its right to contest the foreclosure sale, and its right to occupancy and rent during the redemption period.⁶¹ The details of the foreclosure sale and the rights of creditors are unchanged by the statute.

H. Mortgage Defaults

As with leases, there is no definitive set of covenants that must be included in a mortgage. Nonetheless, there are a number of covenants commonly found in mortgages. However, perhaps because mortgagors retain title to the property while lessees do not acquire title, there are typically fewer covenants imposed upon mortgagors than upon

⁵⁶ See Minn. Stat. §§581.02 and 581.10.

⁵⁷ Compare, for example, Minn. Stat. §§580.11 and 581.05, which permit the mortgagee to purchase the subject property at the foreclosure sale.

⁵⁸ See Minn. Stat. §582.32, subd. 3(b).

⁵⁹ See Minn. Stat. §582.32, subd. 4(a).

⁶⁰ See Minn. Stat. §582.32, subd. 3(b)(1).

⁶¹ See Minn. Stat. §582.32, subd. 3(b)(2) and (3).

lessees. For example, there is not typically any restriction on the modification or repair of the property. Typical covenants in a mortgage include making timely payments on the mortgage, making timely payments on any prior debt secured by the property, paying all taxes that may become due on the property, preventing further encumbrances or liens on the property, purchasing adequate insurance on the property, and keeping the property in good repair. *See also Pinger v. Atkinson*, 169 Minn. 474, 211 N.W. 681 (1927) (holding that foreclosure under a second mortgage was proper where mortgagor failed to make timely payments under the first mortgage).

IV. CONCLUSION

There are differences between those who rent and those who own. However, when it comes to remedies available against defaulting lessees and mortgagors, there are significant similarities between them. Not only are the proceedings and remedies closely analogous, the types of covenants giving rise to defaults are often identical. However, because of the differences between lessees and mortgagors, it is important for lessors and mortgagees to be aware of these differences so as to draft leases and mortgages that adequately protect their respective interests in the property.